### ESTATE OF VICTOR YOUNG BEAR

**IBIA 80-3** 

Decided July 24, 1980

Appeal from an order by Administrative Law Judge Garry V. Fisher determining, inter alia, that the decedent was survived by a daughter legally adopted through action of the Fort Berthold Superintendent and by an illegitimate daughter.

Reversed in part; affirmed in part.

1. Indian Probate: Adoption: Generally

One who participated in an adoption proceeding has no standing to object that some other person was deprived of his or her constitutional rights.

2. Indian Probate: Adoption: Generally

Where the jurisdictional invalidity of an Indian adoption granted by an officer of the Bureau of Indian Affairs appears on the face of the record, the judgment is open to attack, direct or collateral, at any time.

3. Indian Probate: Adoption: Generally

The Supreme Court's ruling in <u>Fisher v. District Court of the Sixteenth Judicial District of Montana</u>, 424 U.S. 382 (1976),

makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions. The Act of July 8, 1940, simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress.

4. Indian Probate: Children, Illegitimate: Generally--Indian Probate: Evidence: Generally--Indian Probate: Hearing: Full and Complete

The Administrative Law Judge held a full and complete hearing on the issue of decedent's possible paternity of Stephanie Young Bear and his finding that she was conceived by decedent through criminal intercourse with his purported daughter by adoption was supported by a preponderance of the evidence.

APPEARANCES: James P. Fitzsimmons, Esq., for appellant; Janet C. Werness, Esq., for appellee Theresa Bluhm.

#### OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Victor Young Bear, deceased Hidatsa allottee No. 2232, died intestate at Hardin, Montana, on July 12, 1973, possessed of trust property located on the Fort Berthold Indian Reservation in North Dakota. On August 8, 1979, Administrative Law Judge Garry V. Fisher entered an Order Determining Heirs in which he found decedent's lawful heirs to be: Alice Young Bear as surviving spouse; Theresa Bluhm as an adopted daughter; and Stephanie Young Bear as an illegitimate daughter.

Alice Young Bear petitioned for rehearing on September 6, 1979, contending that the Administrative Law Judge erred in not proclaiming her to be decedent's only lawful heir. The petition was denied by Judge Fisher by order dated September 12, 1979. A timely appeal from Judge Fisher's order denying rehearing was filed by Alice Young Bear, through counsel, on September 27, 1979. The appeal was docketed by the Board on October 16, 1979.

## **Background**

Theresa Bluhm, 1/ an enrolled member of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, was born January 9, 1940, to Jack Lone Fight, Sr., deceased Fort Berthold allottee, and Alvina Recette, an enrolled Sioux Indian of the Fort Peck Reservation in Montana, also deceased. This family, including other children, lived together for a while on the Fort Berthold Reservation. However, domestic problems developed between Theresa's parents, and sometime after her birth and before December 1944, Alvina Recette returned to Fort Peck.

In December 1945, Theresa was taken into the home of Victor Young Bear, decedent herein, and his wife, Alice Young Bear, the appellant. The Young Bears lived on the Fort Berthold Reservation: Victor was

 $<sup>\</sup>underline{1}$ / Theresa Bluhm is a name acquired by marriage. It is the name by which Theresa identified herself as a witness. Tr. of August 30, 1978, hearing at 19.

enrolled at Fort Berthold; Alice Young Bear, a Chippewa Indian, Turtle Mountain Reservation, was adopted at an early age by a Fort Berthold family and thereafter raised on the Fort Berthold Reservation.

On December 26, 1945, Fort Berthold Superintendent C. H. Beitzel signed a document which the Administrative Law Judge has characterized as a formal approval of an Indian adoption effected under provisions of 25 U.S.C. § 372a (1976). 2/

<sup>&</sup>lt;u>2</u>/ Act of July 8, 1940, c. 555, §§ 1, 2, 54 Stat. 746. The statute provides:

<sup>&</sup>quot;[Sec. 1] [I]n probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption--

<sup>&</sup>quot;(1) Unless such adoption shall have been--

<sup>&</sup>quot;(a) by a judgment or decree of a State court;

<sup>&</sup>quot;(b) by a judgment or decree of an Indian court;

<sup>&</sup>quot;(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

<sup>&</sup>quot;(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

<sup>&</sup>quot;(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this Act or in the distribution of the estate of an Indian who has died prior to that date: <u>Provided</u>, That an adoption by Indian custom made prior to the effective date of this Act may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded., and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

<sup>&</sup>quot;Sec. 2. This Act shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this Act."

The "instrument of adoption" relied upon by the Administrative Law Judge contains the signed statements of Victor Young Bear and Alice Young Bear that they desired to adopt "Theresa Lone Fight" as well as the signed consent of Jack Lone Fight, Sr., Theresa's natural father, to such an adoption. The December 26, 1945, instrument does not contain thereon the signature of Theresa's natural mother, Alvina Recette. 3/ However, it refers to an attached statement signed by

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Acceptable form for use in Adoption of a minor under the provisions of the Act of July 8, 1940 (Public No. [sic] 773 - 76th Congress.)

"The undersigned, <u>Victor Youngbear</u> Allottee No. <u>1232</u>, and <u>1158</u>, and <u>1158</u>, a minor born on or about the <u>1158</u>, a minor with the understanding that such adopted child shall have the same rights as if it were their own child, and shall be entitled to all the rights of ingeritance <u>1158</u> as if it were their natural child. I or we are related to said minor as follows <u>1158</u> We are not related to this child and the reasons for adopting said minor are as follows: <u>1158</u> The mother of the child has deserted the family, and since we do not have any children wish to adopt the within named child, and have her name changed to Youngbear instead of Lonefight.

"And the undersigned <u>Jack Lonefight</u> Allottee No. <u>1200</u>, and <u>Vina Lonefight</u> (Recette) See attached statement signed by her. Allottee No. <u>Ft. Peck All.</u> parents or natural guardian of said minor do by these presents hereby consent to the adoption of said minor by the parties first hereinabove named.

"I or we are related to said minor as follows: <u>Parents of Theresa Lone Fight</u> and I or we have consented to this adoption for the following reasons: <u>Unable to give the child a good home.</u>

(VICTOR YOUNGBEAR)
(ALICE YOUNGBEAR)

x/s/ Victor Young Bear x/s/ Alice Young Bear Adoptive parent or parents /s/ Jack Lone Fight Sr Jack Lonefight, father

<sup>3/</sup> The "instrument of adoption" dated December 26, 1945, is reprinted below:

Alvina as evidence of her consent to Theresa's adoption. The foregoing attached statement to the "instrument of adoption" is dated December 26, 1944. As written, it states as follows:

Fort Peck Agency Poplar, Montana December 26, 1944

To Whom It May Concern:

Chief of Police James Archdale have shown me a letter today from Supt. C. H. Beitzel of the Ft. Berthold Agency Elbowoods, North Dakota where Mr. Jack Lone Fight my husband desired my consent to an agreement so my children one Ellison Lone Fight age 8 years old and Carrie Lone Fight age 6 years old and Theresa Lone Fight age 4 years old so that they can be adopted out.

I herewith consent and sign this agreement & accordingly as I understand it, provided that anytime in the future I feel qualified, under the circumstances and competent to take one or all three of them I shall do so if sufficient proof is furnished by me and that my right as their mother is recognized.

Vina Recette

Witnesses
James Archdale
Chief of Police
Rose Archdale

Theresa stayed with the Young Bears for approximately 8 or 9 years during which time she attended school at Marty, South Dakota.

 She spent her summers with the Young Bears. When admitted to school and while receiving different services through the Bureau of Indian Affairs, Theresa was known as Theresa Young Bear.

At various times Theresa ran away from her home with the Young Bears. Alice Young Bear once attempted to relinquish custody of Theresa but she was prevailed upon by Agency officials to keep her in her home.

In 1956 Victor Young Bear was convicted of raping Theresa on June 26, 1954. He was incarcerated as a result of this conviction. Coincidental with the conviction of Victor Young Bear, Theresa left the Young Bear household and never returned.

On April 16, 1955, Theresa gave birth to a daughter, Stephanie. Theresa claims Victor Young Bear is the father of Stephanie and the Administrative Law Judge so found in the proceedings below.

# **Issues on Appeal**

In her notice of appeal dated September 24, 1979, Alice Young Bear contends that the Administrative Law Judge erred in determining that Theresa Bluhm was legally and validly adopted by the decedent. Appellant further contends that the Administrative Law Judge had no

authority nor sufficient evidence to make the determination that Stephanie Young Bear is the daughter of the decedent.

#### Discussion and Conclusions of Law

# I. The Adoption Question

Appellant claims the Superintendent of the Fort Berthold Agency did not possess legal authority to grant an adoption of Theresa Bluhm in 1945 and that, absent such authority, the purported adoption is void and without legal effect.

[1] As one of the "adopting parents" who signed a statement in 1945 expressing the desire to adopt Theresa as her own child, 4/ it is arguable that appellant should not have standing over 30 years later to challenge the adoption in a probate proceeding where her own interests are presumably self-served. Were it merely asserted by appellant that irregularities were committed in an otherwise lawful Departmental adoption proceeding, including such severe error as failure to obtain the required consent of one of the natural parents--as may well have

 $<sup>\</sup>underline{4}$ / In the proceedings below, appellant testified that she and decedent never intended to adopt Theresa and that her understanding of the document signed by her on December 26, 1945, was that she agreed to assume custody of Theresa. Tr. of August 30, 1978, hearing at 50-51. From the record as a whole, we think appellant's intent in 1945 was to formally adopt Theresa as her daughter. To this extent we uphold the findings and conclusions of the Administrative Law Judge in his Order Determining Heirs dated August 8, 1979, at 2-3.

occurred in the case at bar--the Secretary could readily dismiss such an attack for lack of standing by the complaining party. It is the generally accepted rule that those who participated in an adoption proceeding have no legal right to object that some other person was deprived of his or her constitutional rights. In re Smith's Estate, 86 Cal. App. 2d 456, 195 P.2d 842 (1948); 2 Am. Jur. 2d Adoption § 72 (1962). See also Estates of Morgan Black and Mary Grant Black, 5 IBIA 219, 225 (1976).

[2, 3] In the case before us, however, it is a main contention of appellant that the Superintendent's adoption action constitutes a void judgment open to attack in any proceeding, direct or collateral, where, as here, the jurisdictional invalidity appears on the face of the record. 5/

The Board is persuaded that it has the authority and legal duty in this case to declare the Superintendent's adoption action null and void. This decision is required in light of the Supreme Court's holding in Fisher v. District Court of the Sixteenth Judicial District of Montana, 424 U.S. 382 (1976). There, the Court was called upon to review a decision of the Montana Supreme Court which held that a lower state court had jurisdiction over the adoption of an Indian child on the Northern Cheyenne Indian Reservation in Montana. The Montana

<sup>&</sup>lt;u>5</u>/ Appellant's Brief filed November 19, 1979, at 8, citing 46 Am. Jur. 2nd 347-49 (1969).

Supreme Court read 25 U.S.C. § 372a (1976) as a congressional grant of jurisdiction over reservation adoptions to state courts, just as the Administrative Law Judge in the case at bar viewed the Act as a grant of jurisdiction to the Bureau of Indian Affairs over reservation adoptions. <u>Cf.</u> 25 U.S.C. § 372a(1)(a) and (1)(c) (1976). In reversing the Montana Supreme Court's ruling, the Court stated in <u>Fisher</u>:

25 U.S.C. § 372a manifests no congressional intent to confer jurisdiction upon state courts over adoptions by Indians. The statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior. It recognizes adoption "by a judgment or decree of a State court" as one means of documentation but nowhere addresses the jurisdiction of state courts to render such judgments or decrees. The statute does not confer jurisdiction upon the Montana courts. [Footnote omitted.]

424 U.S. 382, 388-89.

The Supreme Court's ruling in <u>Fisher</u> makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions. The Act simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress. <u>See</u> 25 U.S.C. §§ 372-73 (1976). For example, under the Act of March 3, 1931, 46 Stat. 1494, the Superintendent of the Crow Indian Agency is specifically authorized to approve Indian adoptions on the Crow Reservation in Montana. <u>See</u> 25 CFR 11.29C; <u>Estate of Walks With A Wolf</u>, 65 I.D. 92 (1958). In

short, Indian adoptions accomplished by the Superintendent of the Crow Agency pursuant to the Act of March 3, 1931, <u>supra</u>, or by any other superintendent pursuant to statute, typify the nature of adoption referred to by Congress in section 1(1)(c) of the Act of July 8, 1940. <u>6</u>/ <u>See</u> n.2, <u>supra</u>.

Appellant submits that the BIA adoption at issue in this appeal is also void because exclusive jurisdiction over the matter rested with the Three Affiliated Tribes of the Fort Berthold Reservation by virtue of their acceptance of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1976), and the Secretary's approval of the tribes' Code of Laws, adopted December 9, 1943, which contains provisions concerning adoption. 7/

Since we have ruled that the purported adoption of Theresa Bluhm by appellant and decedent is null and void because the Fort Berthold

<sup>6/</sup> The Board knows of no other acts similar to the Act of March 3, 1931. (Accordingly, other than 25 CFR 11.29C, there are no Departmental regulations regarding adoptions by the BIA, nor are there any BIA manual provisions on the subject.) In view of the strong congressional commitment to tribal control over child custody matters arising on the reservation as recently expressed in the Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, the prospect of future enactments by Congress vesting additional adoption authority in the Bureau of Indian Affairs is most doubtful. It is indeed difficult to perceive a more paternalistic endeavor by the BIA on Indian reservations than the granting of adoptions of Indian children.

7/ Departmental approval of the Code of Laws for the Three Affiliated Tribes of the Fort Berthold Reservation was rendered on February 4, 1944, by Oscar L. Chapman, Assistant Secretary.

Superintendent had no authority to grant such an adoption, it is not necessary that the Board determine whether the Three Affiliated Tribes possessed sole jurisdiction over her adoption in 1945. (Unlike Fisher, supra, in which the Supreme Court held that the Northern Cheyenne Tribe possessed exclusive jurisdiction over an adoption proceeding among reservation Indians, in the case before us an apparent indispensable party to the adoption proceeding, Theresa's natural mother, neither lived on the reservation at the time of the adoption nor was she a member of the Three Affiliated Tribes. Neither is appellant a member of the Three Affiliated Tribes. 8/)

In the absence of a legal adoption through the proper state or tribal forum, the question arises whether Theresa can be recognized as an adopted daughter of the decedent by Indian custom. The right to designate the customs that are to be given recognition in regulating matters that affect tribal internal and social relations rests with each tribe as an incident of its sovereignty.

<u>United States v. Mazurie</u>, 419 U.S. 544 (1975). There is no universal doctrine of Indian custom adoption. <u>9</u>/

<sup>8/</sup> By order dated April 13, 1944, Assistant Secretary Chapman, in response to a resolution of the Fort Berthold Tribal Business Council dated March 9, 1944, entrusted to the Fort Berthold Tribal Business Council and the Fort Berthold Tribal Court "all jurisdiction and authority vested in the Court of Indian Offenses for the Fort Berthold Reservation, over Indians not members of the Three Affiliated Tribes who are members of any recognized tribe now under Federal jurisdiction."

<sup>&</sup>lt;u>9</u>/ <u>Cf. Estate of Harold Humpy</u>, 7 IBIA 118, 86 I.D. 213 (1979), disavowing the theory of universal Indian custom divorce.

There is no evidence that the Three Affiliated Tribes recognized adoption by Indian custom in 1945. Rather, it appears the only way an Indian adoption could be accomplished under tribal law would be in accordance with section 25 of the Code of Laws of The Three Affiliated Tribes which, with limited exceptions, required the consent of all parties 10/ and acceptance thereof by the Fort Berthold Indian Court. 11/

Based on the above, the Board cannot sustain the Administrative Law Judge's holding that Theresa Bluhm is the adopted daughter of Victor Young Bear. <u>12</u>/

### II. The Paternity Question

Appellant challenges the Administrative Law Judge's determination that Stephanie Young
Bear is the daughter of decedent on two grounds. First, it is alleged that the Administrative Law
Judge failed to conduct a full and complete hearing on the paternity issue prior to ruling thereon.
According to appellant, notwithstanding that some

<sup>&</sup>lt;u>10</u>/ <u>See</u> section 25, Code of Laws of the Three Affiliated Tribes, at (c) and (d). (Consent of a child over age 14 was not required.)

<sup>11/</sup> Id. section 25(d).

<sup>&</sup>lt;u>12</u>/ It is noted that in accordance with the laws of descent and distribution in Montana, Theresa shared in the estate of her deceased natural mother. She was also declared to be an heir at law of her natural father in the Departmental probate of his estate, as determined by North Dakota law then in effect, and would have shared in his estate had he died intestate. North Dakota has since adopted the Uniform Probate Code which generally precludes an adopted child from inheriting from his or her natural parents.

evidence regarding Stephanie's paternity was adduced at the evidentiary hearing of August 30, 1978, it was the understanding of the parties that a supplemental hearing on this matter would be scheduled by the Administrative Law Judge. Second, appellant maintains that the paternity finding entered by the Administrative Law Judge is not supported by a preponderance of the evidence. We reject both of the above contentions.

[4] The Administrative Law Judge held two hearings in the subject estate. The first hearing held at Poplar, Montana, on April 17, 1974, essentially resolved only that Victor Young Bear died without a will and that he was survived by a spouse, appellant herein. By notice dated August 4, 1978, the Administrative Law Judge scheduled a supplemental hearing for August 30, 1978, for the purpose of establishing "whether or not, in addition to the surviving spouse, Alice Bradford Young Bear, decedent had other heirs." The possibility that Stephanie Young Bear could be an heir at law of decedent was mentioned in the notice of hearing. Counsel for appellant appeared at the hearing of August 30, 1978, prepared to rebut a showing that Stephanie Young Bear was fathered by decedent:

As far as, now that it's been brought up, as far as Stephanie Young Bear is concerned, our only knowledge of Stephanie Young Bear until this order came out mentioning her name, was essentially the fact that Theresa Bluhm had had a child at a certain point in time. Now, from the time that order was issued, we've talked to our client and gathered up as much data as we can find, and based on her discussions with us, and my discussions with doctors and so

forth, we doubt seriously whether Victor Young Bear could be the father of Stephanie Young Bear.

Tr. of hearing at 4.

A prima facie case was established at the hearing that Stephanie Young Bear, born April 16, 1955, was fathered illegitimately by decedent by virtue of his unlawful intercourse with Theresa Bluhm on June 26, 1954. Appellant sought to rebut this showing primarily through two forms of hearsay evidence. First, appellant testified that decedent had told her that because of an accident he could not father children. Second, appellant offered into evidence an affidavit from a local physician in New Town stating that, in the physician's opinion, it is very unusual for a woman to carry a child for a period exceeding 285 days. (Here, carriage lasted 294 days.) The affidavit was rejected on grounds that the New Town physician should have been summoned to the New Town hearing to relate his expert opinion subject to cross-examination. Tr. of August 30, 1978, hearing at 74.

Because Stephanie Young Bear was not represented at the New Town hearing through her own counsel, the Administrative Law Judge indicated at the hearing that he would hold yet another supplemental hearing in this case if, upon his review of the evidence, another hearing appeared necessary for the protection of her interests. Another hearing was not deemed required and the Administrative Law Judge entered a decision approximately 1 year later on August 8, 1979, in which he evaluated the evidence as follows:

I find that Stephanie Young Bear is the biological issue of decedent. I accept the credibility of Theresa Bluhm that she had intercourse only with decedent and that decedent was the only possible source of impregnation during the pertinent period. The testimony of Alice Young Bear is conflicting. She states that decedent fathered no children because she was "a very puny, sickly, skinny child" (Tr. 3) and challenges her own credibility when she later attributes the barren marriage to an accident in which decedent suffered injuries prior to the marriage. Having found decedent is the biological father of Stephanie Young Bear, there is no constitutional basis for a denial of the right of inheritance by Stephanie Young Bear (Deta Mona Trimble and Jessie Trimble v. Joseph Roosevelt Gordon, et al., 430 US 762, 52 L Ed 2d 31, 97 S Ct 1459).

Order Determining Heirs at 3.

In view of the foregoing, the Board is satisfied that appellant was allowed a full and complete hearing on the issue of Stephanie's paternity. Further, we agree with the Administrative Law Judge that the preponderance of the evidence establishes Stephanie Young Bear to be the daughter of decedent. <u>Cf. Estate of Alvin Hudson</u>, 5 IBIA 174 (1976).

Therefore, in accordance with the authority vested in the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Determining Heirs entered by Administrative Law Judge Garry V. Fisher on August 8, 1979, is hereby reversed as to his finding that Theresa Bluhm is an heir at law of the decedent and affirmed as to his finding that Stephanie Young Bear is an heir at law of the decedent.

This decision is final for the Department.	
	Wm Dhilin Horton
	Wm. Philip Horton Chief Administrative Judge
I concur:	
 Franklin D. Arness	

Administrative Judge